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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. EDDIE MENDEZ, Appellant.	2 CA-CR 2008-0202 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200700335

Honorable Stephen F. McCarville, Judge

AFFIRMED AS CORRECTED

Harriette P. Levitt — Tucson
Attorney for Appellant

E S P I N O S A, Judge.

¶1 Twelve jurors found appellant Eddie Mendez guilty of dangerous or deadly assault by a prisoner, a class two, dangerous-nature felony, and promoting prison contraband, also a class two felony. Mendez committed both offenses in December 2006,

when he assaulted a Department of Corrections (DOC) counselor with a thirteen-inch shank, a "homemade prison knife." The trial court subsequently found Mendez had three historical prior felony convictions. It sentenced him to an aggravated, fifteen-year prison term for the assault, enhanced for the dangerousness of the offense, and to a mitigated, fifteen-year term for promoting prison contraband, apparently enhanced for the repetitive nature of the conviction.[1] The court ordered the terms served concurrently with each other and with the sentence Mendez was already serving.

¶2 Mendez filed a timely notice of appeal, and the court appointed counsel to represent him. Counsel has filed a brief invoking *Anders v. California*, 386 U.S. 738 (1967); *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969); and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), stating that she has thoroughly reviewed the record without finding any arguable issue to raise on appeal and asking this court to search the record for error. Counsel has complied with the requirements of *Clark* by "setting forth a detailed factual and procedural history of the case with citations to the record," satisfactorily demonstrating "that counsel has in fact thoroughly reviewed the record." 196 Ariz. 530, ¶ 32, 2 P.3d at 97. Mendez has not filed a supplemental brief.

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[1]Although the sentencing minute entry describes the offense as "nonrepetitive," the court appears to have sentenced Mendez pursuant to former A.R.S. § 13-604(D), now renumbered as § 13-703(C) and (J). 2008 Ariz. Sess. Laws, ch. 301, § 28. It observed that Mendez's conviction on count two, for promoting prison contraband, "would be his fourth conviction," for which the "presumptive [sentence] is 15.75 [years]." The presumptive sentence under former § 13-604(D) for a class two felony committed with two or more historical prior felony convictions is 15.75 years.

¶3 We have reviewed the record and found that it contains substantial evidence to support Mendez's convictions. That evidence includes the testimony of the victim and of two fellow DOC employees who came to the victim's aid during the incident, witnessed portions of the assault, and recovered the shank Mendez had used to attack the victim. *See generally State v. Carlos*, 199 Ariz. 273, ¶¶ 7-8, 17 P.3d 118, 121 (App. 2001) (charges of dangerous assault by prisoner and promoting prison contraband adequately supported by evidence that defendant attacked another inmate who suffered stab wounds and that defendant was seen holding shank immediately after attack). Additionally, we have confirmed that the sentences imposed do not exceed the maximum terms authorized by former A.R.S. § 13-604(I) and (D).

¶4 We have also searched for error pursuant to our obligation under *Anders*. Although we have found several apparent sentencing errors, all redound to the defendant's benefit. The state has not cross-appealed, and the errors therefore are not reversible.[2] *See*

[2]First, exhibits admitted in evidence at the trial on Mendez's prior felony convictions show that one of Mendez's prior convictions included three counts of robbery, each a dangerous-nature offense, yet the trial court did not find any of his historical prior convictions to have been dangerous offenses. Second, in sentencing Mendez on count two, the court imposed a mitigated sentence despite having found that no mitigating factors existed. *See* A.R.S. § 13-702(B). Third, in imposing concurrent sentences and ordering Mendez "must serve 85 percent of the sentence before being eligible for release," the court violated § 13-1206, which provides that a sentence imposed for the offense of dangerous or deadly assault by a prisoner "shall be consecutive to any other sentence presently being served by the convicted person," who "shall not be eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the sentence imposed by the court has been served or commuted."

State v. Flannigan, 194 Ariz. 150, n.3, 978 P.2d 127, 129 n.3 (App. 1998) ("The record indicates that, despite the jury's findings of dangerousness as to all offenses, the trial court failed to impose the enhanced sentencing provisions of A.R.S. § 13-604(F) and (I). The state, however, did not cross-appeal from the sentence imposed, and we therefore do not address the propriety of those sentences in this decision. *See State v. Dawson*, 164 Ariz. 278, 286, 792 P.2d 741, 749 (1990).").

¶5 The convictions and sentences are affirmed. We direct the trial court to order its sentencing minute entry corrected to reflect that the sentence previously imposed on count two was actually enhanced pursuant to former § 13-604(D) for the repetitive nature of the offense.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge